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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*,

Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Harold Franks and Johnnie Lee, respectfully submit this Supplemental Memorandum in Support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and reply herein to the Responses to the Petition.

At the time the petition was filed, two circuits had ruled on the issue presented by the petition. *Franks* v. *Bowman Transportation Company,* 495 F.2d 398 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.,* 502 F.2d 1309 (7th Cir. 1974).[1] Both Circuits held that Section 703(h), 42 U.S.C. § 2000e-2(h), precludes a grant of retroactive seniority to discriminatorily rejected job applicants. On January 25, 1975, the Sixth Circuit adopted a squarely contrary view in *Meadows* v. *Ford Motor Co., et al.,* —— F.2d ——, 9 EPD ¶ 9907.

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[1] Plaintiff Waters filed a Petition for a Writ of Certiorari on this and other issues on February 24, 1975, No. 74-1064.

Meadows was a sex-discrimination case under Title VII, which presented facts indistinguishable from those on which the petition herein is based. Plaintiff Meadows sued on behalf of a class of 31 female job applicants who had been rejected pursuant to a hiring standard found unlawful by the district court. The trial court granted the plaintiff class certain general relief similar to that allowed by the district court in *Franks*, including priority re-application rights. However, the district court denied Meadows' request for back pay and retroactive seniority to class members who were subsequently hired.

The Sixth Circuit reversed. Perhaps in light of the much-publicized prevalence of severe layoffs in the automobile industry, the court centered its discussion on the complexity of the retroactive-seniority issue in reduction-in-force situations.[2] Despite these equitable difficulties in applying the retroactive-seniority principle to layoffs, the Sixth Circuit rejected the argument that the provisions of Title VII preclude such relief. 9 EPD ¶ 9907 at pp. 6771-2. The Sixth Circuit cited to *Franks* as an example of the Fifth Circuit position it rejected, *id.*

Notwithstanding its serious reservations about applying retroactive seniority in a layoff situation, the Sixth Circuit saw no difficulty in authorizing such seniority for all other purposes, *id.* at p. 6772. To the extent that Petitioners' claim for seniority involves employment benefits rather than layoff rights—and the case as presented by the petition does not present *any* layoff issue—the Sixth Circuit would clearly grant petitioners their remedy on the merits, as well as agreeing with their position on the threshold question presented to this Court.

[2] See, the language quoted in the Union Respondents' Response at pp. 2-3 thereof.

The Third Circuit has spoken twice on the question presented by the petition, and, we respectfully submit, has spoken inconsistently. In *Jurinko* v. *Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), vac'd and rem'd on other grounds, 414 U.S. 970 (1973), the court ordered two unlawfully rejected female job applicants rehired with seniority from the date of their unlawful rejection. But in *Jersey Central Power & Light Co.* v. *Local Unions 372, 749, et al.*, —— F.2d ——, 9 EPD ¶ 9923 (3rd Cir., January 30, 1975), the Third Circuit appeared to adopt a different approach. Unlike *Jurinko* (and *Franks*), *Jersey Central* was not a Title VII hiring case; rather, *Jersey Central* was an employer's action for declaratory judgment brought in the context of an EEOC-approved affirmative action conciliation agreement. The Third Circuit held squarely in *Jersey Central* that § 703(h) of Title VII insulates, as a "bona fide seniority system," a layoff system based on plant seniority (date-of-employment) dates, *id.* at pp. 6860-2.[3]

Meadows, *Jurinko*, and *Jersey Central* demonstrate two further reasons for granting certiorari to resolve the question presented here. First, the appellate courts are deeply divided between and within themselves on the narrow issue presented by the petition: whether § 703(h) precludes seniority relief to discriminatorily rejected job applicants. Second, these cases demonstrate the crucial importance to litigants of the problems raised by the application of traditional seniority rules in a period of severe economic dislocation. Whether the federal courts, under Title VII, can even address themselves to those problems depends largely upon the disposition of the issue presented in the Petition.

[3] One member of the panel, Judge Van Dusen, wrote a concurring opinion which took strong issue with the Court's analysis of § 703(h) while concurring with the judgment on other grounds.

Neither Respondent, in its Brief, has argued in support of the Fifth Circuit's holding on the question presented by the petition. Respondent Bowman concedes that the Fifth Circuit "may be incorrect", while Respondent Union expresses "real doubts as to the correctness of the decision below" and concedes that certiorari should be granted to resolve the differences between the circuits on an important question, as set forth above.[4] Bowman attempts to shift the focus of the petition from the question presented, concerning Section 703(h), to a different question neither decided below nor presented in the petition. That question is: whether a district court may in its discretion refuse to grant retroactive seniority to unlawfully rejected applicants?

That interesting question, *cf. Meadows* v. *Ford Motor Co., supra,* is irrelevant to the petition. The district court did not exercise its discretion in this matter; it believed itself powerless to grant the relief requested (A. 54). The Court of Appeals affirmed on other grounds, but agreed that the relief requested was outside the court's jurisdiction (A. 30-A. 31). When a court denies relief on the basis of an erroneous view of the scope of its jurisdiction, the denial cannot be upheld as a proper exercise of its discretion.

[4] The Solicitor General, as amicus curiae, takes the position that the Fifth Circuit's construction of Section 703(h) was erroneous.

Respectfully submitted,

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